Yeoh Keat Seng v Majlis Perbandaran Pulau Pinang

APPEAL BOARD (PULAU PINANG) — APPEAL NO LR/PP/38 OF 2010
YEO YANG POH CH, TEH THEAM SENG AND ERIC GOH
19 OCTOBER 2011

Civil Procedure — Res judicata — Appeal to Appeals Board — Whether appeal to appeals board barred by res judicata — Planning applicant's appeal to appeals board against rejection of planning permission heard without notifying objecting neighbouring land owners — Whether objectors can file new appeal to appeals board regarding same planning permission — Whether exceptions to res judicata rule based on 'jurisdictional error' applicable

Local Government — Town and country planning — Application for planning permission — Appeal against granting of planning permission — Whether matter res judicata — Planning application rejected by planning authority — Planning permission granted upon appeal by planning applicant to appeals board — Objecting neighbouring land owners not aware of applicant's appeal to appeals board — Whether objectors can now appeal to appeals board against granting of planning permission — Whether exceptions to res judicata rule based on 'jurisdictional error' applicable

On 21 March 1994, planning permission ('the first KM') was granted to the KM applicant to develop portions of lands which came to be known as Taman Desaria ('the first development'). Three plots of land were earmarked for 'educational purposes'. Nearly a decade later, the Education Department released two out of the said three plots of land from educational usage. On 26 March 2004, the KM applicant applied for a second planning permission ('the second KM application'), in order to develop more residential houses on undeveloped plots of the lands ('the proposed second development') next to Taman Desaria. These plots include one of the lots (Lot 11212) which had been released from use for educational purposes. The appellant here ('the present appellant') had, together with 38 other residents of Taman Desaria ('the 2004 objectors'), lodged objections in 2004 to the proposed second development. The respondent heard their objections and later, the KM applicant made some alterations to their initial plans to address some of the objections raised by the 2004 objectors. Despite those alterations to the plans, the respondent rejected the second KM application on the grounds that Lot 11212 was still designated in the Pelan Dasar Perancangan as a land for educational purposes. From that rejection, the KM applicant appealed ('the developer's appeal') to the board in early 2008, under the Town and Country

Planning Act 1976 ('the Act'). The board allowed the developer's appeal ('the 2009 decision') and directed that planning permission ('the second KM') be granted to the KM applicant. The 2004 objectors, including the present appellant, were not notified of the developer's appeal and hence did not have any opportunity to be heard by the board during the hearing of the developer's appeal in 2009. The respondent issued the second KM on 24 November 2010. The present appellant filed this appeal against the granting of the second KM. The KM applicant raised a preliminary objection, namely that the board was functus officio in relation to the subject matter of the present appeal, because the same matter had already been dealt with and adjudicated (on its merits) by the board in 2009.

Held, dismissing the preliminary objection without order as to costs:

(1) The 2009 decision was a judicial decision and was one well within the board's jurisdiction to make. The 2009 decision was made after hearing the merits of the developer's appeal. It was a final decision. Any party dissatisfied with it had to seek remedy at a different forum namely from the High Court by way of judicial review (see paras 29–30).

(2) Prima facie, the subject matter of the present appeal was res judicata as far as the board was concerned. However, one of the recognised exceptions to the res judicata rule is where the court or tribunal, when arriving at the earlier decision now sought to be reopened, had committed a 'jurisdictional error' (see paras 35–37).

(3) Two types of jurisdictional error are frequently illustrated: (i) where a decision was made in excess of the jurisdiction of the court or tribunal that made it; and (ii) where the court or tribunal when arriving at a decision, did not in fact determine or address its mind to the issues or matters which were its basic functions to do; *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537 referred (see para 38).

(4) Upon a proper and purposive construction of the Act, giving an opportunity to an objector to be heard during an appeal by a KM applicant is part of the due process envisaged (though not expressly) by the Act. It is something within, and that forms a part of, the functions of the appeal board. It is also something commanded by the rule of natural justice (see para 51(e)).

(5) In the hearing of the developer's appeal in 2009, the board's attention was not drawn to the fact that there were objectors who were not informed of that proceeding, and who had not been afforded any opportunity to be heard. This meant that a part of the board's functions had inadvertently remained unperformed when it arrived at the 2009 decision. It has given rise to the 'presence of undischarged basic functions'. That in turn gave rise to an exception to the functus officio rule (see paras 52–53).

(6) The doctrines of res judicata and functus officio will not operate in the following situation, where: (a) a jurisdictional error had occurred in relation to the making of the earlier decision, of a nature that has left some (express or implied) function of the tribunal unperformed, or that has given rise to the 'presence of undischarged basic functions'; (b) the empowering statute either expressly or impliedly permits the tribunal to revisit a matter in such an event of a jurisdictional error; (c) the dictates of elementary justice and fairness warrant a re-visit of the matter; and (d) the person who is seeking to revisit an earlier decision has not conducted himself in such a way as to disentitle him from doing so, or which gives the tribunal reason to decline the exercise of this exceptional power or discretion (see para 67).

Obiter:

The board will rarely make a decision such as the present one to reopen an appeal that had been disposed of, and that it will only do so in the limited and exceptional circumstances. The board will not review an earlier decision just because it has second thoughts about it, or because a later panel holds a different view on a matter that has already been decided by a previous panel (see para 69).

[Bahasa Malaysia summary

Pada 21 Mac 1994, kebenaran merancang ('KM pertama') diberikan kepada pemohon KM untuk membangunkan bahagian-bahagian tanah yang dikenali sebagai Taman Desaria ('pembangunan pertama'). Ketiga-tiga plot tanah diperuntukkan bagi 'tujuan pendidikan'. Hampir satu dekad kemudian, Jabatan Pendidikan melepaskan dua daripada tiga plot tanah tersebut untuk kegunaan pendidikan. Pada 26 Mac 2004, pemohon KM memohon untuk kebenaran merancang kedua ('pemohonan KM kedua'), bertujuan untuk membangunkan lebih banyak rumah kediaman di atas plot-plot tanah yang tidak dibangunkan ('pembangunan kedua yang dicadangkan') bersebelahan Taman Desaria. Plot-plot ini termasuk satu daripada lot-lot (Lot 11212) yang telah dilepaskan daripada digunakan untuk tujuan pendidikan. Perayu di sini ('perayu sekarang') bersama-sama dengan 38 orang penduduk Taman Desaria ('pembantah-pembantah 2004') telah melaporkan bantahan-bantahan pada 2004 kepada pembangunan kedua yang dicadangkan. Responden mendengar bantahan-bantahan mereka dan kemudiannya, pemohon KM membuat beberapa perubahan kepada rancangan asal mereka untuk menangani beberapa bantahan yang dikemukakan oleh pembantah-pembantah 2004. Meskipun rancangan tersebut diubah, responden menolak permohonan KM kedua atas alasan bahawa Lot 11212 masih diperuntukkan di dalam Pelan Dasar Perancangan sebagai sebidang tanah untuk tujuan pendidikan. Daripada bantahan tersebut, pemohon KM merayu ('rayuan pemaju') kepada lembaga pada awal tahun 2008 di bawah Akta Perancangan Bandar dan Desa 1976 ('Akta'). Lembaga membenarkan rayuan pemaju ('keputusan 2009') dan mengarahkan bahawa kebenaran merancang ('KM kedua') diberikan kepada

pemohon KM. Pembantah-pembantah 2004, termasuk perayu sekarang, tidak dimaklumkan mengenai rayuan pemaju dan oleh itu tidak mempunyai peluang untuk didengar oleh lembaga semasa pendengaran rayuan pemaju pada 2009. Responden mengeluarkan KM kedua pada 24 November 2010. Perayu sekarang memfailkan rayuan ini terhadap pemberian KM kedua. Pemohon KM mengemukakan bantahan awal, iaitu bahawa lembaga telah functus officio berhubung dengan perkara subjek rayuan ini kerana perkara yang sama telahpun diputuskan dan dihakimi (berdasarkan merit-meritnya) oleh lembaga pada 2009.

Diputuskan, menolak bantahan awal tanpa perintah untuk kos:

(1) Keputusan 2009 merupakan satu keputusan kehakiman dan keputusan tersebut adalah di dalam bidang kuasa lembaga. Keputusan 2009 dibuat selepas mendengar merit-merit rayuan pemaju. Keputusan tersebut adalah muktamad. Sebarang pihak yang tidak berpuas hati perlu mendapatkan remedi di forum lain iaitu daripada Mahkamah Tinggi melalui semakan kehakiman (lihat perenggan 29–30).

(2) Prima facie, perkara subjek rayuan ini adalah res judicata setakat ia berkaitan dengan lembaga. Walau bagaimanapun, satu daripada pengecualian yang diterima kepada prinsip res judicata ialah di mana mahkamah atau tribunal, apabila membuat keputusan terdahulu yang kini dipohon untuk dibuka semula, telah melakukan 'kesalahan bidang kuasa' (lihat perenggan 35–37).

(3) Dua jenis kesalahan bidang kuasa yang selalunya digambarkan: (i) di mana satu keputusan dibuat melebihi bidang kuasa mahkamah atau tribunal yang membuatnya; dan (ii) di mana mahkamah atau tribunal apabila membuat satu keputusan, mereka sebenarnya tidak menentukan atau mengenal pasti isu-isu atau perkara yang merupakan fungsi asas mereka; *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537 dirujuk (lihat perenggan 38).

(4) Menurut kepada pembinaan yang betul dan untuk tujuan akta, memberikan satu peluang kepada pembantah untuk didengar semasa rayuan oleh pemohon KM adalah sebahagian daripada proses yang digambarkan (walaupun tidak secara tersurat) oleh Akta. Ia merupakan sesuatu yang berada di dalam dan membentuk sebahagian daripada fungsi-fungsi lembaga rayuan. Ia juga sesuatu yang diarahkan oleh prinsip keadilan asasi (lihat perenggan 51(e)).

(5) Pada pendengaran rayuan pemaju pada 2009, perhatian lembaga tidak tertumpu kepada fakta bahawa terdapat pembantah-pembantah yang tidak dimaklumkan mengenai prosiding tersebut dan tidak diberikan sebarang peluang untuk didengar. Ini bermakna satu bahagian daripada fungsi-fungsi lembaga tanpa sedar telah kekal tidak dijalankan apabila

lembaga membuat keputusan 2009. Ini membawa kepada 'kewujudan fungsi asas yang tidak dilaksanakan'. Ini seterusnya membawa kepada satu pengecualian kepada prinsip functus officio (lihat perenggan 52–53).

(6) Doktrin res judicata dan functus officio tidak akan beroperasi di dalam situasi berikut, di mana: (a) satu kesalahan bidang kuasa berlaku mengenai keputusan yang dibuat sebelumnya, bersifat yang meninggalkan beberapa (tersurat atau tersirat) fungsi tribunal tidak dilaksanakan, atau yang membawa kepada 'kehadiran fungsi asas yang tidak dilaksanakan'; (b) statut yang memberi kuasa, sama ada secara tersurat atau tersirat membenarkan tribunal untuk menyiasat semula perkara apabila berlaku kesalahan bidang kuasa; (c) Asas keadilan mewajarkan penyiasatan semula perkara tersebut; dan (d) orang yang memohon untuk mengkaji semula keputusan sebelumnya tidak berkelakuan secara yang tidak memberikan hak kepadanya berbuat demikian, atau yang memberikan tribunal alasan untuk menolak untuk menggunakan kuasa atau pertimbangan yang tersendiri ini (lihat perenggan 67).

Obiter:

Lembaga jarang membuat keputusan seperti di dalam kes ini untuk membuka semula satu rayuan yang telah diputuskan, dan lembaga hanya berbuat demikian di dalam keadaan yang terhad dan tertentu. Lembaga tidak akan menyemak semula keputusan sebelumnya hanya kerana mereka mempunyai pemikiran selepas mengenainya, atau kerana panel terkemudian mempunyai pendapat berbeza mengenai perkara yang telahpun diputuskan oleh panel terdahulu (lihat perenggan 69).]

Notes

For a case on application for planning permission, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 200.

Cases referred to

Akewushola v Secretary of State for the Home Department [2000] 2 All ER 148, CA (refd)

Bakers (PE) Pty Ltd v Yehuda (1988) 15 NSWLR 437 (refd)

Jackson v Purton [2011] TASSC 28, SC (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (refd)

Minister for Immigration v Bhardwaj (2002) 76 ALJR 598, HC (folld)

Ong Hooi Bing v MPSP Appeal No LR/SP/11 of 2009 (unreported) (refd)

R v Kensington & Chelsea Rent Tribunal [1974] 3 All ER 390, CA (folld)

Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank (M) & Ors, Interveners) [2000] 3 MLJ 201; [2000] 2 AMR 2035, CA (refd)

Thrasyvoulou v Secretary of State for the Environment [1988] 3 WLR 1, CA (refd) A

Legislation referred to

Appeal Board Rules 1989 r 5(c)
Interpretation Acts 1948 and 1967 s 17A B
Town and Country Planning Act 1976 ss 21, 21(6), (8), 22(3), 23(1), (1)(b), (2), (3)

Lakhbir Singh for the appellant.
Shamiah (Zuraini with her) for the respondent.
Christina Siew for the applicant. C

Yeo Yang Poh Ch:

BACKGROUND FACTS

D

[1] Sungei Ara Holdings Sdn Bhd ('SAH') owned large tracks of land in Sungei Ara, Penang. In the early to mid-nineties, SAH had agreed with the KM applicant, for the latter to develop portions of those lands. That development became what is now known as Taman Desaria, comprising many residential houses. For ease of reference, I shall call that development 'the first development'. E

[2] During the process of procurement of planning permission for the first development, three plots of land (Lots 11212, 11213 and 11214) were earmarked for 'educational purposes'. On 21 March 1994, the relevant planning permission ('the first KM') for the first development was granted. F

[3] Nearly a decade later, on 23 September 2003, the Education Department wrote a letter to the KM applicant, agreeing to release two out of the said three plots of land (namely Lots 11212 and 11214) from educational usage, subject to conditions. The KM applicant accepted those conditions, and later fulfilled them. By a letter dated 21 September 2004, the Education Department confirmed the release of the said two lots from educational usage. This letter is found on p 61 of the *rekod rayuan* ('RR'). Later, this 'release' was again confirmed in a letter dated 3 October 2005 from the Education Ministry to the respondent (see RR p 63). G H

[4] Meanwhile, on 26 March 2004, the KM applicant applied for a second planning permission ('the second KM application'), in order to develop more residential houses on three undeveloped plots of the lands ('the proposed second development'), next to Taman Desaria. These three plots include Lot 11212 (see RR pp 67–72), ie one of the lots earlier designated for educational purposes but which has since been released from such usage. I

[5] The appellant here ('the present appellant') had, together with 38 other residents of Taman Desaria ('the 2004 objectors'), lodged objections in 2004 to the proposed second development. The respondent heard their objections, in an enquiry attended also by the KM applicant. Later, the KM applicant made some alterations to their initial plans, apparently in its desire to address (at least some of) the objections raised by the 2004 objectors.

[6] Despite those alterations to the plans, however, on 10 December 2007 the respondent rejected the second KM application. The sole reason stated for that rejection was that Lot 11212 (though having been 'released' by the Education Department) was nevertheless still designated in the *pelan dasar perancangan* ('master plan') as a land for educational purposes. One would be quick to assume that this was the only reason why the respondent had rejected the second KM application, if not for the fact that the board has in the past encountered instances where the local planning authority 'chose the easy way out' by merely stating what it considered to be the most obvious reason, instead of setting out all its reasons for rejection. I hope this did not happen in the case here. Otherwise, as we shall soon come to appreciate, the inadequacy and undesirability of giving incomplete reasons would give rise to untold difficulties if and when the matter comes before the board by way of appeal.

[7] From that rejection, the KM applicant appealed to this board in early 2008, under the Town and Country Planning Act 1976 ('the Act'). That appeal was registered as Appeal No LR/PP/2 of 2008 ('the Developer's Appeal'). After hearing the KM applicant and the respondent, on 30 June 2009 this board allowed the developer's appeal ('the 2009 decision'), and directed that planning permission ('the second KM')be granted to the KM applicant, with conditions if necessary.

[8] The 2004 objectors, including the present appellant, were not notified of the developer's appeal. They did not know of the developer's appeal at the time, and were not given any opportunity to be heard by the board during the hearing of the developer's appeal in 2009. The KM applicant does not dispute the fact that the present appellant (and the other 2004 objectors) only came to know of the developer's appeal, and of the 2009 decision, very much later.

[9] As a result, the2009 decision of this board in allowing the developer's appeal was made without hearing the 2004 objectors (including the present appellant), and without giving them an opportunity to be heard. Here lies the root of the problem, and the difficult legal issues thrown up by the current dispute,on which this board is now asked to adjudicate.

[10] On 16 December 2009, the respondent carried out the 2009 decision, by granting the second KM, subject to numerous conditions. However, the

second KM was in fact only issued to the KM applicant on 24 November 2010 (see RR p 123), almost a year later! The reason for this, we are told, was that some of the conditions imposed (particularly the re-zoning of Lot 11212) had to be first fulfilled, before the second KM could be issued. The huge time gap between granting and issuing the second KM is a curious thing, to put it mildly. There were other ways in which the respondent could have handled the situation that it faced (which I will go into in due course, if it becomes necessary to do so).

[11] The next event in the chronology is, from the legal point of view, a strange one. On 24 November 2010 (the day the second KM was issued), the respondent gave notice to the 2004 objectors, informing them that it had granted the second KM on 16 December 2009 (ie almost a year earlier), and telling the 2004 objectors that they were 'entitled to appeal' against the grant of the second KM if they so wished.

[12] I must pause to observe that the issuance of that notice to the 2004 objectors was rather illogical, and not something required or permitted by the Act. When, after the hearing of an appeal, the appeal board orders or directs a local authority to grant a planning permission that the latter had earlier refused, surely it would be nonsensical for that local authority to then notify an objector of the same and inform the objector that he could appeal to the same board against that board's own decision! That will not make sense at all.

[13] Nevertheless, that misguided notification led to 79 residents of Taman Desaria (many more than the original 2004 objectors) giving a joint letter of objections to the respondent, against the grant of the second KM. It was followed by the present appellant filing the present appeal. The other 78 residents did not officially join him, citing costs as a reason.

[14] At once, it is apparent that the propriety of the present appeal can be called into question, it being the product of the respondent's said notification the propriety of which has itself already been criticised above. We shall return to this question later. For now, let me continue with the narration of events.

[15] After filing the present appeal, no proactive steps were taken by the present appellant, until sometime in the middle of 2011, when the KM applicant commenced some clearing works at the site concerned. This led to the present appellant taking steps to request that this appeal be heard as soon as possible. Consequently, this appeal was fixed for its first mention (and for case management) on 19 July 2011.

[16] During the case management, the board took note of the urgency of the situation, as the KM applicant had now commenced work at the site (which, I

hasten to add, it was entitled to do). That being the case, the board enquired of the present appellant whether he intended to either make an application to the board to stay the implementation of the second KM, or alternatively seek an injunction from the High Court to similar effect. Counsel for the present appellant informed the board that the present appellant wished to do neither, though aware that in which case the KM applicant is not obliged to suspend its works pending the outcome of the present appeal.

[17] The board fixed an early hearing date, ie on 23 August 2011. At the outset of the hearing, the KM applicant raised a preliminary objection, namely that this board was functus officio in relation to the subject matter of the present appeal, because the same matter had already been dealt with and adjudicated (on its merits) by the board in 2009. Brief arguments on this issue were presented, after which the present appellant's counsel requested an adjournment in order for him to prepare a full response to the preliminary objection.

[18] The matter was then adjourned to 21 September 2011 for further hearing, on which day full arguments were heard from all parties, and decision on the preliminary objection was reserved.

[19] One more matter warrants a brief mention, before I proceed to examine the arguments concerning the KM applicant's preliminary objection.

[20] In the past months, the present appellant and his group of Taman Desaria residents went public with their unhappiness about the grant of the second KM, perhaps with the desire of bringing some public pressure to bear. There is, of course, nothing wrong with doing that per se. Unfortunately, in the resultant newspaper reports, much factual misinformation were published and disseminated (some of which were attributed as quotes from the present appellant), particularly in an article that appeared in the *New Straits Times* on 20 July 2011. When asked, the present appellant admitted that he took no steps to try to correct the numerous misinformation contained in the newspaper articles. This is quite wrong and unacceptable. The present appellant was taken to task for it, by the board. He has since apologised, and the unfortunate episode is put to rest, with a stern warning to him that it must not be repeated.

[21] The present appellant (and all other parties who come before this board) must clearly understand that this board succumbs only to the force of sound arguments of law, fairness and justice, as they apply to the facts of a case. It does not bow to any other form of pressure, public or private; and regardless of the source or the intensity. Even a threat of removal or loss of position will not succeed in improperly influencing the members of this board; for it is my

firm conviction that every judge or adjudicator must perform his or her duty with genuine independence and impartiality, and without regard to any undue pressure, even if by doing so it may cost him or her the job. I hope that this board will not in the future have any need to repeat this position to anyone else.

THE GRAVAMEN OF THE KM APPLICANT'S PRELIMINARY OBJECTION

[22] The preliminary objection is, in one sense, rather straightforward.

[23] The subject matter of the present appeal concerns whether or not the second KM ought to be granted. That was the same subject matter which came up for determination by the board in 2009, in the developer's appeal. The board had, on 30 June 2009, decided on the matter. No doubt the present appellant was not a party to the developer's appeal, and he was not heard by the board before the board made the 2009 decision. That, however, does not negate the fact that the board did make a decision on the same subject matter that now resurfaces in the form of the present appeal.

[24] The simple conclusion that may ensue is this. Once the board had made that 2009 decision, the board becomes functus, and it cannot revisit the matter. Expressed in another way, the matter is res judicata. If the present appellant feels that the board had erred in making the 2009 decision without hearing him, his proper remedy lies in seeking a judicial review of that 2009 decision (preceded by an application for extension of time where necessary). But the present appellant cannot come to the board, because this board cannot revisit the same subject matter. This, in a gist, is how the preliminary objection goes.

[25] There is much force in that simple but clear argument, backed by sound and obvious reasons of policy: see eg *Akewushola v Secretary of State for the Home Department* [2000] 2 All ER 148, and the other cases cited by the KM applicant. There must be finality to every process of adjudication.

[26] Learned counsel for the present appellant argues to the contrary. He submits that, for res judicata to apply, all of the following five conditions must be met:

(a) the earlier decision must be a judicial decision (as opposed to an administrative decision);

(b) the earlier decision made must be within the jurisdiction of the court or tribunal that made it;

(c) the earlier decision must be a final decision, made after considering the merits of the case;

A (d) the earlier decision had determined the same question that is now sought to be adjudicated at the same court or tribunal; and

(e) the earlier decision must either be a decision in rem, or involved the same parties as the ones in the current case (or their privies).

B

[27] Let us examine each of these criteria in turn, in relation to the facts of our case.

C **[28]** The 2009 decision was a judicial decision. It is futile to argue otherwise. A decision of a local planning authority is an administrative decision. An appeal from such administrative decision proceeds to the appeal board, and undergoes a process and procedure akin to the workings of a court. The board hears and receives evidence (both oral and documentary), and considers submissions on both the facts and the law, before arriving at its decision. Its D functions, and its functioning, are far from administrative. I am not aware of any authority that considers its decisions to be purely administrative, and the present appellant has not pointed to any.

E **[29]** The 2009 decision was one well within the board's jurisdiction to make. The present appellant may want to argue that the decision was wrong. But that does not mean, and is an entirely different thing from saying, that it was a decision that the board had no power or jurisdiction to make.

F **[30]** Record shows that the 2009 decision was made after a hearing of the merits of the developer's appeal. It was a final decision, in the sense that it disposed of the subject matter of that appeal at the stage of the appeal board. Any party dissatisfied with it had to seek remedy at a different forum — namely from the High Court by way of judicial review. The term 'final' is used here in G contrast with 'interlocutory'. The 2009 decision was certainly not interlocutory in nature.

[31] Learned counsel for the present appellant cited the case of *Thrasyvoulou v Secretary of State for the Environment* [1988] 3 WLR 1, for the proposition H that every decision of an appellate planning tribunal is not a 'final' decision. Learned counsel for the KM applicant, on the other hand, promptly pointed out that the case did not say so. A careful reading of the *Thrasyvoulou* case will reveal that learned counsel for the KM applicant is right. There is an obvious distinction, warranted by good policy reasons, between a decision denying I planning permission on the one hand, and a decision allowing planning permission on the other. In the former case, the decision will not preclude the making of a subsequent fresh application for planning permission, nor prevent that subsequent application from being considered in the light of any changed circumstances. It is not 'final', in this limited sense only. On the other hand, a

decision granting planning permission is final, because how else could anyone safely proceed with a development if the permission granted (barring any judicial review) is not final and may be reversed at any future time? A

[32] The following passage in the *Thrasyvoulou* case clarifies the distinction just explained: B

> There is a clear distinction, it seems to me, between the rejection of an appeal against the refusal, in administrative discretion, of an application for planning consent to new development and the holding on an appeal against an enforcement notice that a use being made of land is a lawful use within the established rights of the occupier. It is an essential requirement for application of the principle of issue estoppel that the decision relied upon as giving rise to the estoppel be a final decision between the parties. A decision on an appeal under section 88 that a particular use of land by the occupier is a lawful use within the established rights of the occupier is, in my judgment, in that sense to be regarded as a final decision. A decision on appeal under section 36 rejecting an application for planning consent is not final in that sense (see pp 10H–11B of the report). C D

[33] The question for decision by the board in 2009 in the developer's appeal was whether or not the second KM ought to be granted to the KM applicant. The 2009 decision had determined this question in favour of the KM applicant. This is now the same question that the present appellant seeks to be re-adjudicated before this board; only that he wants the question to be determined against the KM applicant instead. E F

[34] It is true that the 2009 decision did not involve exactly all the same parties as the ones in the present appeal, because the present appellant was not a party to it. However, the 2009 decision was a decision in rem. A decision of the appeal board on planning mattersis indeed a decision in rem. It decides, for example, whether or not a development can take place on a piece of land. This question does not depend on who the owner of the land is. It cannot be that a development is permitted on a property if A is its owner, but disallowed if B is the owner. The effect of a planning decision is, quite clearly, in rem. Learned counsel for the KM applicant cited three cases that put this point beyond doubt. Among them is the case of *Bakers (PE) Pty Ltd v Yehuda* (1988) 15 NSWLR 437, where at p 445C–D of the report, the following passage is found: G H

> … the res, whether it be the land or the [planning] consent, has a status which is not derived from any private arrangement but from the decision of a public authority exercising the statutory powers conferred upon it. … the granting of the consent was a public act affecting the status of the land. The consent was also a thing in itself, deriving its status from the statute … I

[35] Therefore, all five conditions for the operation of res judicata (as submitted by the present appellant himself) are met in the instant case. Prima facie, the subject matter of the present appeal is res judicata as far as this board is concerned. However, is the board's door completely shut to the present appellant, or are there any extraordinary circumstances in this case that could give rise to an exception to the res judicata rule?

ARE THERE EXCEPTIONS TO THE RES JUDICATA OR FUNCTUS OFFICIO RULE?

[36] Human situations are often infinitely variable. Hence, the following two characteristics are common to most legal doctrines: (a) almost every rule or principle of law will have its exceptions; and (b) many legal concepts are usefully illustrated, rather than exhaustively defined, so that their categories are rationally regulated but seldom closed.

[37] One of the recognised exceptions to the res judicata rule iswhere the court or tribunal, when arriving atthe earlier decision now sought to be re-opened, had committed a 'jurisdictional error'. What amounts to a 'jurisdictional error' is not exclusively defined. None of the parties referred the board to any authority explaining the meaning of this legal term of art. Learned counsel for the KM applicant submitted that it meant a decision that exceeded the power of the decision-maker, ie a decision which was not within its jurisdiction to make. No doubt that is an obvious example of a jurisdictional error, perhaps the most common one, but I do not understand it to be the only category of jurisdictional errors.

[38] My research reveals that two types of jurisdictional error are frequently illustrated: (a) where a decision was made in excess of the jurisdiction of the court or tribunal that made it; and (b) where the court or tribunal when arriving at a decision, did not (for one reason or another) in fact determine or address its mind to the issues or matters which were its basic functions to do: see the Federal Court in *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449 at 455a–b and 455f. The first type of jurisdictional error has obviously no relevance to our case here. It is the second type that demands closer investigation.

[39] A jurisdictional error occurs when a tribunal (often inadvertently) did not fully carry out all the basic functions which were its duty to perform, so that it can be said that some fundamental function(s) remain(s) unfulfilled. For convenience of brevity of reference, I shall refer to this second type of jurisdictional error as the 'presence of undischarged basic functions'. In summarised words, a jurisdictional error occurs when there is the presence of

undischarged basic functions on the part of a tribunal, in which event the doctrines of res judicata and functus officio do not apply. A

[40] But, is there a presence of undischarged basic functions in the circumstances of our case? That is the question we must investigate and answer. B

[41] If it was necessary or desirable that, in determining the developer's appeal, the 2004 objectors (including the present appellant) ought also to have been heard even though they were not formal parties therein, then it is possible to argue that an omission to hear them (apart from raising an issue of breach of natural justice) results in the presence of undischarged basic functions, and thus amounts to a jurisdictional error; since in those circumstances it could reasonably be said that the board had yet to complete one of its basic functions under the Act (namely, that of hearing all relevant and interested parties, including any objectors). The board in such circumstancesis not functus, where there remain important undischarged functions (barring of course any application of the de minimis rule). C D

[42] Were the 2004 objectors a *relevant and interested party that ought to have been heard* by the board in 2009 vis a vis the developer's appeal (or at least ought to have been given the opportunity to be so heard)? E

[43] The present appellant is quick to answer in the positive. Learned counsel for the present appellant contends that the board, in making the 2009 decision, had not complied with the express provisions of s 23(2) of the Act. I find no merits in this contention. F

[44] Section 23(2) enjoins the board, when considering an appeal, to 'hear the appellant and the local planning authority'. The 2004 objectors (including the present appellant) were not the appellant in the developer's appeal. They were not a party named in the developer's appeal. There was therefore no breach of any express provision of s 23(2). Neither has the present appellant been able to show any other express provision elsewhere in the Act enjoining the board to hear an objector, in an appeal by a KM applicant. G H

[45] However, while the Act does not contain any express provision rendering it mandatory for an objector to be heard in an appeal by a KM applicant, there is at the same time also no provision indicating that an objector should not be heard in such circumstances. Section 23(2), for example, does not stipulate that the board 'shall hear only the appellant and the local planning authority', or 'shall hear the appellant and the local authority, and no one else'. I

[46] In fact, in the case of an appeal by an objector (who is then the appellant), the board as a matter of practice hears not only the objector (the

appellant) and the local planning authority, but also hears the KM applicant (even though it is not a named party). In this type of situation, the KM applicant frequently turns up at the hearing and seeks to be heard. A KM applicant is always aware of an objector's appeal to the board because, although the Act does not so require, r 5(c) of the Appeal Board Rules 1989 provides that a KM applicant be notified of any appeal by an objector. Sadly, no similar rule is made for the 'converse situation', ie in respect of notifying an objector regarding an appeal by a KM applicant. This is an obvious lacuna.

[47] This board has had occasion to ponder over the issue, in an earlier *(Ong Hooi Bing v MPSP)* Appeal No LR/SP/11 of 2009. In paras 4–15 of the written judgment in that appeal, I had expressed the following views (reproduced below for convenience of reference, with emphasis added):

> 4. I wish to first deal with the presence of and participation by the Objectors at the hearing, done at the invitation of this Board. In my view, *this should be done as a matter of course, or as a general practice*. I will explain why.
>
> 5. There are two types of appeal under s 23(1) of the Act. The first type, under s 23(1) (a), is an appeal by an aggrieved applicant of planning permission, whose application was either refused or was granted with a condition unacceptable to him or her. The second type, under s 23(1)(b), is an appeal by an objector to an application for planning permission. The appellant in this second type of appeal will be an owner of a neighbouring land as defined under s 21(8). This occurs because the application has been granted, in full or in part. Our present case falls under the first type of appeal.
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> 6. In the first type of appeal, apart from the immediate parties to the appeal, there could *sometimes* be another interested party, namely an objector (if there is one). In the second type of appeal, there is *always* another interested party apart from the appellant and the respondent, namely the applicant for planning permission. Hence, *in a lot of the cases, there is a third interested party besides the appellant and the respondent.*
>
> 7. Yet, s 23(2) of the Act enjoins the Appeal Board, when considering an appeal, to hear only the appellant (either an applicant for planning permission or an objector) and the respondent (the local planning authority). There is no mention of the third interested party that I have pointed out would exist in a lot of the cases.
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> 8. This unhappy omission (which I regard as an oversight) is, in relation to the second type of appeal only, happily remedied by Rule 5(c) of the Appeal Board Rules 1989 (made pursuant to s 36(15) of the Act) ('the Rules'), which states the following:
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> > 5. Upon filing of a notice of appeal, the Registrar shall
> >
> > …

(c) where the appeal is brought pursuant to section 23(l)(b) of the Act, forthwith also serve upon the person who applied for the planning permission.

9. So, in the second type of appeal, an applicant for planning permission will be immediately notified if an objector files an appeal. He will then have the opportunity to come before the Board and seek permission to address the Board. *The planning permission granted to him will not be revoked (by the Appeal Board) without his knowing and without an opportunity for him to seek to be heard by the Appeal Board.*

10. But the first type of appeal has not received similar supplement in the Rules. When an unsuccessful applicant for planning permission appeals to the Appeal Board, there is nothing in the Act or in the Rules that requires an objector to be informed, let alone to be heard. *An objector, who thought that his objections were successful when the application for planning permission was turned down by the local planning authority, might wake up one day to find that the decision of the planning authority has been reversed via a process about which he has had no knowledge and in which he has not been given any opportunity to participate. That does not appear to me to be fair.*

11. I can see no good reason for the unequal treatment between the 2 types of appeal. *In any adjudicative proceedings, the rule of natural justice is one of the most basic requirements that have to be followed. And natural justice requires the giving of an adequate opportunity to an interested person to be heard, before the making of a decision affecting that person.* This is a matter of fairness, and can further be argued as a matter of 'legitimate expectation', important no less to the adjudicative process of the Appeal Board. These concepts have received recognition both at common law and by our courts: see e g the remarks made by Shankar J (as he then was) in an analogous context in the case of *Lee Freddie v MPPJ* [1994] 3 MLJ 640 at pages 654 & 655.

12. In my view, therefore, the Rules should be amended to expressly provide for the right of an objector to be heard (in the first type of appeal); and the current Rule 5(c) should be strengthened to provide a similar right for an applicant of planning permission to be heard (in the second type of appeal), instead of merely to be notified of the proceedings.

13. *Meanwhile, fortunately, this Board is not powerless to give effect to the principle of natural justice alluded to above.* I say so for 2 reasons. Firstly, Rule 9 empowers me to request or require further information and documents to be furnished; and this can be done by way of hearing such persons that may be able to provide any information relevant to the determination of this appeal. Secondly, this Board has wide powers under s 36(10)(g) of the Act to make any order not inconsistent with the Act, which would include the making of an order permitting an objector to be heard (if he so wishes) in the circumstances of this case. Section 36(10)(g) provides as follows:

36(10) In respect of an appeal before it, the Appeal Board -

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(g) may make any order whether or not provided for by, and not inconsistent with, this Act.

14. Thus, when this appeal first came up for hearing on 29/1/2010, and when I realised that the relevant objectors had not been informed of the same, I had directed that all objectors be notified and be invited to participate in the hearing of this appeal (if they wished to do so). I had on that day explained the reasons for my order (though not in as much detail as I am now doing); and both the appellant and the respondent stated that they had no objections to the same. This explains the presence of the Objectors at the resumed hearing of this appeal. It has been explained to the Objectors that, although under the Act and the Rules they did not have an automatic right to be heard, this Board was affording them the opportunity to participate, as a matter of natural justice.

15. I wish to state that, as a general rule, it is a preferred practice to notify objectors of the hearing of an appeal lodged under s 23(1) (a) of the Act, and to allow them to attend and participate in it if they so wish. But I must hasten to add that any omission to do so will not in my view render the proceedings irregular, in view of the present lack of express stipulation requiring it to be done.

B C D E

[48] Since expressing those views, I have found no reason to depart from them.

[49] In the absence of an express provision, one way or the other, concerning whether an objector ought to be heard in an appeal by a KM applicant, it remains for us to ascertain if anything may be implied from the Act regarding this matter of natural justice. This can be done by examining the scheme of the Act as a whole, and by asking ourselves what the true intent and purpose of the Act are concerning this issue. In so doing, we may do well to bear in mind the statutory injunction issued by s 17A of the Interpretation Acts 1948 and 1967, which states:

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> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

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[50] Our continuing quest may be formulated in the form of a more specific question as follows: should the Act in general (ie the Town and Country Planning Act), and s 23(2) of the Act in particular, be construed to imply that, in an appeal by a KM applicant, an objector: (a) ought to be heard, or (b) should not be heard?

I

[51] I think the answer is plain. An objector in those circumstances ought to

be heard, and ought to be given an opportunity to be heard. There are at least the following reasons:

(a) it is clearly a matter of natural justice, accepted as important and crucial in all kinds of process of adjudication. In planning appeals, it cannot be denied that an objector is an interested party, and that a decision of the appeal board will affect the interest of an objector;

(b) the stated purpose of the Act is to achieve 'proper control and regulation of town and country planning in Peninsular Malaysia' (see its Preamble). The Act sets out a scheme whereby every development (with few exceptions) can only be carried out subject to planning permission. In determining whether or not planning permission should be given in any particular case, the Act specifies three parties whose respective interests are relevant, and whose views should be heard and, if accepted, given effect. These three categories of persons are: (a) the local planning authority, as a 'one-stop' regulatory body (who in turn gathers the views of numerous other technical departments), representing the wider public interest; (b) a KM applicant whose interest and desire is to carry out the development; and (c) an objector, if any, whose opposing interest is to avoid the development. An objector must be an owner of a neighbouring land, which is defined under s 21(6) read with s 21(8) of the Act, in order to belong to a class of persons whose interest is statutorily recognised as being directly and more specifically affected, over and above that of the general public. This third category of persons (neighbour/objector) comes into play only 'in an area in respect of which no local plan exists for the time being' (which is the situation with respect to the Penang Island at present);

(c) a neighbour/objector having been granted specific statutory right to object, it would negate the intent and purpose of the Act if he or she is denied the right to be heard at the appeal board. Hence, a construction that permits rather than disallows an objector to be heard is definitely the preferred interpretation, in line with the requirement of s 17A of the Interpretation Acts. Such a construction will be in consonance with, and promote, the intent and purpose of the Act; whereas the contrary interpretation will deny or diminish its full purport;

(d) the point being made becomes even clearer if we ask the following question. Assuming that, in an appeal by a KM applicant, an objector comes to know about it, appears at the hearing before the board, and requests to be heard on the reasons for his objection. Will the board allow his request; or will the board tell him that the proceedings do not concern him and he cannot be heard? I would think that the board will, and must, do the former. I am confident that, if this had happened in 2009 in the developer's appeal, the board would have done so; and

(e) upon a proper and purposive construction of the Act, giving an opportunity to an objector to be heard during an appeal by a KM applicant is part of the due process envisaged (though not expressly) by the Act. It is something within, and that forms a part of, the functions of the appeal board. It is also something commanded by the rule of natural justice.

[52] Unfortunately, in the hearing of the developer's appeal in 2009, it would seem that the board's attention was not drawn to the fact that there were objectors who were not informed of that proceeding, and who had not been afforded any opportunity to be heard.

[53] What is the effect of that omission? In my view, it means that a part of the board's functions had inadvertently remained unperformed when it arrived at the 2009 decision. Putting it in another way, it has given rise to the 'presence of undischarged basic functions' (as defined in para 39 above). That in turn gives rise to an exception to the functus officio rule, as the following authorities will illustrate.

[54] *Minister for Immigration v Bhardwaj* (2002) 76 ALJR 598 is a decision of the High Court of Australia, ie the highest Australian court. The following passages from that case are illuminating to the issue under consideration here:

> … circumstances can arise where a rigid approach to the principle of functus officio is inconsistent with good administration and fairness. The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen (per Gleeson CJ, at p 600 para 8).
>
> The error made by the tribunal in this case must be contrasted with other, non-jurisdictional, errors that a decision-maker may commit. In particular a jurisdictional error of the kind made in relation to the September decision is fundamentally different from a case where, for whatever reason, a decision-maker has second thoughts about such matters as findings of fact (per Hayne J at p 624 para 149).
>
> Once it is recognised, as it must be in the present case, that in September 1998 the tribunal had not performed the duty imposed on it (to review in accordance with the statutory procedures, *including allowing the respondent to be heard*) it is clear that not only was there no bar to the tribunal completing its task by the steps it took in October, *it was duty bound to do so* (per Hayne J at p 625 para 155. (Emphasis added.))

[55] Therefore, there is good authority for holding that, in relation to tribunals, the functus officio rule may be more flexibly applied (or disapplied) in order to achieve fairness, particularly when a 'jurisdictional error' has

occurred (in the sense explained in paras 38–39 of this judgment). Where a duty (express or implied) to hear an interested party has, due to in advertence or otherwise, not yet been carried out, the High Court of Australia goes as far as saying that, not only is there no bar to a tribunal completing its task by reopening the matter and hearing that interested party, *it is duty bound to do so*. I would adopt the same position here.

[56] Learned counsel for the KM applicant made a valiant effort in trying to limit the effect of the *Bhardwaj* case. She brought to our attention the recent case of *Jackson v Purton* [2011] TASSC 28, which discusses the *Bhardwaj* case; for which my gratitude is owed *Jackson v Purton* is a decision of the Supreme Court of Tasmania (a court, incidentally, subordinate to the High Court of Australia). Indeed, it opines (at para 54 of the judgment) that the *Bhardwaj* case 'is not authority for the universal proposition that jurisdictional error leads to the decision having no consequences whatsoever. … *Bhardwaj* case supports the proposition that the legal and factual consequences of the decision will depend upon the particular statute'.

[57] The decision I am inclined to arrive at will not be at odds with the passage in *Jackson v Purton* just cited. It is not my view that there exists any 'universal proposition' that every jurisdictional error renders a decision void or to be of no effect. What I do hold is that *a jurisdictional error of the nature that has left some function of a tribunal unperformed, when combined with the presence of other pertinent factors,* will disable the applicability of the principle of functus officio, and enable the tribunal to reopen a matter for further consideration, which but for the existence of that jurisdictional error it would not be able to do. The other factors I speak of would include, where relevant, the powerful summon of elementary justice and fairness, and a careful examination of the empowering statute to make sure that a re-consideration of the case is either expressly or impliedly permitted under it. Regard must be had to the purpose and intent of the statute, which is why I have gone to great length in analysing the same (in paras 41–51 of this judgment).

[58] Another passage, from para 70 of the judgment in *Jackson v Purton*, will further explain why my view is not in conflict with that case:

> The determining question is: 'whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen'? … that requires examination of two questions: '*Has the tribunal discharged the functions committed to it by statute?*' … and 'what does the statute provide, *expressly or by implication*, as to whether, and in what circumstances, a failure to discharge its functions means that the tribunal may revisit the exercise of its powers'?. (Emphasis added.)

[59] In the circumstances of the present case, I would answer the first question (posed in *Jackson v Purton*) in the negative, and the second question in the affirmative (by reason of implication rather than express stipulation).

[60] It is note worthy that our own Court of Appeal has in fact, in the case of *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank (M) & Ors, Interveners)* [2000] 3 MLJ 201; [2000] 2 AMR 2035, gone much further than the *Bhardwaj* case when commenting on the issue of a breach of natural justice, by holding that 'orders that have been obtained in breach of the rules of natural justice … are nullities' (at p 2045), and that an order obtained without the knowledge of an interest party (who was not cited as a party in the proceeding) has deprived that person of his right to be heard, and consequently 'is a breach of the rules of natural justice and (the order) is a nullity' (at p 2048). No doubt the Court of Appeal was speaking about a court of inherent jurisdiction (which is why I am not placing reliance on this dictum; but it can nevertheless be argued that the same reasoning applies to a tribunal (subject of course to there being no prohibition by the empowering statute of a reconsideration of a case). Having said that, however, I wish to make it clear that, in this judgment, I prefer to adopt the reasoning in the *Bhardwaj* case; and I see no conflict with what is said in *Jackson v Purton*, so far as the circumstances of our present case are concerned.

[61] Another authority of assistance to our situation is *R v Kensington & Chelsea Rent Tribunal* [1974] 3 All ER 390, which dealt with a similar (though not identical) situation, where a tribunal disposed of a matter in the absence of a party (when he had a reason for his absence but which reason was not known to the tribunal at the time), and thereafter refused to reopen the matter. The English Court of Appeal held as follows:

> It may be as a matter of strict law there is no obligation on the tribunal to have a further hearing; I express no view on that, but I would express forcibly the view that whether it is necessary as a matter of strict law or not, in this case it would be clearly right *in elementary justice* that there should be a hearing at which the applicant can put his case if he wants to (at p 394d–e).
>
> … the disappointed party has what is certainly a cheaper if not more effective remedy open to him, that he can go back to the tribunal, explain why he did not attend, and the tribunal will then have the jurisdiction if it thinks fit to reopen the matter and to reconsider its decision in the light of representations made by the absent party (at p 396b).

[62] Similarly, in our case, I find that it is a requirement of elementary justice

that this board gives the 2004 objectors an opportunity to be heard. As explained by the English Court of Appeal, a tribunal such as the appeal board has the power to do so.

[63] I am conscious of the fact that, in the *Kensington*'s case, the absent person was a party named in the proceeding, whereas in our case it is not. But, in view of the reasoning I have given in paras 41–51 above, and the conclusion that I have come to in that regard, that is not a distinction which would prevent the principle enunciated in the *Kensington* case from applying to our situation here.

OTHER ARGUMENTS ADDRESSED BY THE PARTIES

[64] Learned counsel for the present appellant tried another way of circumventing the res judicata rule, by arguing that the present appeal must be taken as properly lodged, since under s 23(1)(b) of the Act the present appellant has the right to appeal to the board against any KM granted by the respondent pursuant to s 22(3). According to him, the issue of res judicata does not arise, because the present appellant is simply exercising a statutory right.

[65] But the short answer to this contention, as learned counsel for the KM applicant points out, is that we are not dealing with a planning permission granted by the respondent pursuant to s 22(3) at all. Quite the contrary, the respondent had as a matter of fact refused to grant a planning permission under that section, which was what had led to the developer's appeal in the first place. What we have here is a planning permission granted pursuant to s 23(3), as a result of a successful appeal to the board. Section 23(1) is therefore inapplicable to the facts of this case. As has been alluded to in para 12 of this judgment, it also does not make sense to have an appeal lodged to the board against a decision of the board itself.

[66] Other (minor) arguments were also made during the hearing of the preliminary objection. In view of the conclusions I have reached above, and the analysis given in their support, it has become unnecessary for me to traverse each and every of those arguments.

CONCLUSIONS

[67] The above analysis of the facts and the law applicable to this matter leads me to the conclusion that the doctrines of res judicata and functus officio will not operate in the following situation, where:

(a) a jurisdictional error had occurred in relation to the making of the earlier decision, of a nature that has left some (express or implied) function of

A the tribunal unperformed, or (in other words) that has given rise to the 'presence of undischarged basic functions' (see para 39 above);

(b) the empowering statute either expressly or impliedly permits the tribunal to revisit a matter in such an event of a jurisdictional error as aforesaid;

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(c) the dictates of elementary justice and fairness warrant a re-visit of the matter; and

(d) the person who is seeking to re-visit an earlier decision has not conducted himself in such a way as to disentitle him from doing so, or which gives C the tribunal reason to decline the exercise of this exceptional power or discretion.

[68] I find that these conditions are satisfied in our present case. Therefore, I dismiss the preliminary objection raised by the KM applicant, without order D as to costs.

[69] Lest I be misunderstood, I wish to stress that this board will rarely make a decision such as the present one to re-open an appeal that had been disposed of, and that it will only do so in the limited and exceptional circumstances set E out above. As an illustration, this board will not review an earlier decision just because it has second thoughts about it, or because a later panel holds a different view on a matter that has already been decided by a previous panel.

F **[70]** Another thing which I must make very clear is this. Holding that the matter is not res judicata, and that this board can reconsider the same, of course does not necessarily mean that it will come to a conclusion that is any different from the 2009 decision. That is something that remains to be seen (if the matter proceeds to full reconsideration).

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[71] This board has agonised over what is the correct decision to make with regard to the issue of res judicata. This decision is one of the most difficult ones that I have had to make, because there are good arguments and sound policy reasons both ways. I wish to thank all counsel for their invaluable assistance to H the board, through their respective abled submissions and the authorities that they have produced.

[72] I am particularly impressed with, and grateful to, Ms Siew, for the way she had discharged her duty in this matter. When referring to authorities upon I which she wished to rely, she did not just highlight passages in them that were favourable to her arguments. She did not conveniently shy away from other dicta that might be construed against her cause; but instead she took them head-on with skillful rebuttals. The decision I have arrived at, though not in her favour, is in no way a result of any inadequacy in her submissions, but rather

due to what in my view is an insurmountable factual situation in the present case, namely the situation of an elementary unfairness inadvertently brought to bear upon the 2004 objectors who, while having succeeded in their objections at the enquiry stage before the respondent, did not (until very much later) even have a clue that their success was overturned years later without their knowledge and without them being given any opportunity to be heard before the reversal of their fate. The compelling need, in terms of elementary natural justice, to address this genuine grievance of the present appellant looms large behind the entire process of deliberations of the board.

[73] Strange as it may at first sound, however, dismissing the preliminary objection does not mean that this board will proceed to hear the present appeal. This is because the effect of this decision is merely that this board is not functus vis a vis the developer's appeal, or, putting it in another way,the board can reopen and reconsider the developer's appeal. This is different from saying, and this decision certainly does not say, that the present appeal is properly instituted.

[74] On the contrary, for the reasons expressed in paras 12, 14 and 65 of this judgment, I am of the view that the present appeal has not been properly instituted. What the present appellant ought to have done (and can do) is to apply to intervene in the developer's appeal, and at the same time persuade the board that it can revisit that appeal by hearing the present appellant who was not heard in 2009.

[75] Hence, after the delivery of the above decision, I propose to invite further arguments from all parties on whether or not the present appeal (ie Appeal No LR/PP/38/2010) should be struck out notwithstanding the decision that the matter is not res judicata. If the board, after hearing arguments, should come to a decision to strike out the present appeal, the present appellant will be at liberty to decide on his next course of action.

[76] For the record, the other two learned members of the panel concur with the decisions made above, and the reasoning therefor.

Preliminary objection dismissed without order as to costs.

Reported by Kanesh Sundrum